

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION**

INTERNATIONAL WOMAN'S DAY MARCH PLANNING)	
COMMITTEE , an unincorporated association, and)	
SAN ANTONIO FREE SPEECH COALITION , an)	
unincorporated association,)	
Plaintiffs,)	
vs.)	CIVIL ACTION No. SA-07-CA-971-XR
CITY OF SAN ANTONIO,)	Plaintiffs' Post-Hearing Memorandum in
)	Support of Their Motion for Preliminary
)	Injunction
Defendant.)	

**PLAINTIFFS' POST-HEARING MEMORANDUM IN SUPPORT OF THEIR MOTION
FOR PRELIMINARY INJUNCTION**

TO THE HONORABLE JUDGE XAVIER RODRIGUEZ:

Plaintiffs, by and through their counsel of record, submit this Post-Hearing Memorandum in Support of their Motion for Preliminary Injunction. Part One of this memorandum sets out the general framework of authority relevant to this case. Part Two addresses the questions posed by the Court: 1) What is the distinction between security costs and traffic control costs? 2) Assuming that the costs for traffic control could be accurately distinguished from other police costs, would it be constitutionally permissible for a city to charge permit holders the costs for traffic control personnel and devices? and 3) Is it constitutionally permissible for the City to waive police, barricade and/or clean-up costs for some street marches while imposing them for others? Part Three reiterates Plaintiffs' grounds for a preliminary injunction.

Part One – General Framework of Authorities

1. Public Forum Doctrine.

Under well-established First Amendment doctrine, access to the traditional public forums of streets, parks, and town squares is rigorously protected. *United States v. American Library Association*, 539 U.S. 194, 206 (2003), *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). The Supreme Court has explained the doctrine regarding “traditional public forums”:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

Streets and parks, the 'quintessential public forums,' must remain open to peaceful expression subject only to reasonable time, place, and manner restrictions that “must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.” *Thomas v. Chicago Park District*, 534 U.S. 316, 323 n.3 (2002), citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Reasonable time, place, and manner restrictions include permit requirements, e.g. *Cox v. New Hampshire*, 312 U.S. 563 (1941); noise limits, e.g. *Rosenbaum v. San Francisco*, 484 F.3d 1142 (9th Cir. 2007); time limits, e.g. *Pennsylvania Alliance for Jobs & Energy v. Council of Munhall*, 743 F.2d 182, 188 (3d Cir. 1984); advance application requirements, e.g. *Quaker Action Group v. Morton*, 516 F.2d 717, 735 (D.C. Cir. 1975); and sign-size regulations e.g. *White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518, 1538 (D.C. Cir. 1984).

2. Public Forum Fees and Costs

The Supreme Court has had few occasions to judge the constitutionality of fees and costs imposed on speakers in traditional public forums. *Cox v. New Hampshire*, 312 U.S. 563 (1941) is cited by the City as a leading case on this issue, but that case involved prosecution for marching without a permit and the Court’s off-hand discussion of permit fees is mere dicta. Indeed, as Professor Eric Neisser observed, “the record in *Cox* was barren of information as to the kinds of services for which marchers would be charged. ... Even assuming, however, that the Supreme Court was considering police service fees rather than parade license administrative fees, its discussion of the fee issue was cursory, superficial, and based entirely on what the New Hampshire court said about how the ordinance would work.” Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 Geo. L.J. 257 (1985).

Two years after *Cox*, in *Murdock v. Com. of Pennsylvania*, 319 U.S. 105 (1943), the Supreme Court suggested, again in dicta, that only a “nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question” may be imposed on public forum expression.

In the wake of *Cox* and *Murdock*, lower courts reached conflicting conclusions about the constitutionality of public forum fees and costs. Compare *Central Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir. 1985) (ordinance requiring permit-holders to pay the costs for overtime police officers is unconstitutional) and *Eastern Connecticut Citizens Action Group v. Powers*, 723 F.2d 1050 (2d Cir. 1983) (ordinance requiring \$200 fee for demonstration on city-owned railroad bed is unconstitutional) with *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir. 1991) (ordinance requiring permit holder to pay costs of police traffic control services (\$672.50) is not unconstitutional).

In 1992, the Supreme Court took certiorari in a case directly involving public forum costs. *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992) involved a county ordinance that required parade permit holders to pay a fee of up to \$1,000 “to provide for the issuance of permits for parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes.” The Ordinance specified that the County Administrator “shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order.”

The Supreme Court held that the County Ordinance is unconstitutional for two reasons: (1) it does not prescribe adequate standards for the County Administrator to apply when setting the amount of a parade permit fee, and (2) it directs the County Administrator to consider “the cost of necessary and reasonable protection of persons participating in or observing” the event, and that would necessarily require the County Administrator to consider the content of the march’s message.

In dicta, the *Forsyth County* majority commented on the use of the word “nominal” in *Murdock*: “This sentence does not mean ... that only nominal charges are constitutionally permissible.”

It is helpful to recognize that the ordinances involved in *Cox* and *Forsyth County* were not significantly different. Instead, the change from *Cox*’s dicta to *Forsyth County*’s holding is due

in large part to the change in First Amendment case law over the intervening 51 years. Most importantly, the Supreme Court recognized the inevitability of content discrimination when officers are given broad discretion to regulate public forum expression, *see, e.g. Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640, 649 (1981), *Shuttlesworth v. City of Birmingham*, 394 U.S. 935 (1969) and the Court identified the “heckler’s veto” problem in regulations that depend on the response of participants or observers to the content of the public forum expression, *see, e.g. Boos v. Barry*, 485 U.S. 312, 320 (1988) (opinion of O’Connor).

Following *Forsyth*, lower courts continue to disagree about whether local governments can charge permit holders for the cost of police traffic control services, traffic control devices, and clean-up costs. *Compare Sullivan v. City of Augusta*, __ F.3d __, 207 WL 4357565 (1st Cir. 2007) (City of Augusta may charge parade permit holders traffic and clean-up costs) with *The Nationalist Movement v. City of York*, 481 F.3d 178 (3d Cir. 2007) (ordinance requiring parade permit holder to pay the costs of traffic control and cleaning up is unconstitutional).

3. Fifth Circuit Public Forum Law

It is interesting to note that the Fifth Circuit, in which so many of the most dramatic and turbulent street marches of the Civil Rights Movement occurred, is perhaps the most protective of public forum expression. The Fifth Circuit has developed an analysis that disapproves the imposition of costs on parade permit-holders and imposes rigorous uniformity on legitimate time, place, and manner regulations.

In *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), the Fifth Circuit considered a local ordinance requiring a permit to distribute literature or solicit funds at the Dallas-Fort Worth Airport. The Ordinance required permit holders to pay \$6 a day to defray the costs incurred by the Airport Board in administering and enforcing the permit system. Judge Jerre Williams begins his analysis by recognizing the threat to freedom of expression inherent in the imposition of costs and fees:

Exaction of fees for the privilege of exercising First Amendment rights has been condemned by the Supreme Court. ... Were states permitted to tax First Amendment activities, the eventual result might be the total suppression of all those voices whose pockets were not so deep. ‘Freedom of speech ... [must be] available to all, not merely to those who can pay their own way.’” (*citing Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943))

Judge Williams then interprets *Cox v. New Hampshire, supra* as permitting “a licensing fee to be used in defraying administrative costs... **but only to the extent that the fees are necessary.**” (emphasis added). 663 F.2d at 633. This is an important qualification, Judge Williams suggests, because the distinction between a “proper cost of regulation fee” and an “impermissible ‘flat license fee’” is “slippery.” Local governments can always claim to collect money “to defray expenses,” and quite simply, First Amendment rights should not depend on the speaker’s “willingness and ability to pay.” *Id.* at 633. The imposition of costs on permit-holders, Judge Williams concludes, is unconstitutional.

Similarly, the Fifth Circuit is vigilant regarding differential access or burden on First Amendment expression. In *Knowles v. City of Waco*, 462 F.2d 430 (5th Cir. 2006), the Fifth Circuit held that two Waco ordinances impose unconstitutional time, place, and manner regulations on street demonstrations. Noting that “Public streets are the archetype of a traditional public forum” and from “time out of mind ... have been used for public assembly and debate.” (quoting *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)), Chief Judge Edith Jones acknowledged that “the rights of government to limit First Amendment activity in a public forum are ‘sharply circumscribed.’” (quoting *Perry Educ. Assn. v. Perry Local Educators Assn.*, 460 U.S. 37, 45 (1983)).

The Waco Parade ordinance involved in *Knowles* requires a permit for all “Parades” or “street activity” on Waco streets, but exempts “funeral processions,” “students going to and from classes or participating in educational or recreational activities,” and “a government agency acting within the scope of its functions.” The Court held that “these exemptions condemn the ordinance.” In *Beckerman v. City of Tupelo*, 664 F.2d 502 (5th Cir. 1981), the Court explained: “because the City is so willing to disregard the traffic problems” that could be caused by school children and government agencies, it could not accept the contention that “traffic control is a substantial interest” justifying Tupelo’s permitting scheme. Similarly, Chief Judge Jones concludes, the Waco Parade Ordinance is unconstitutional. *Id.* at 437.

These three cases, *Fernandes*, *Knowles*, and *Beckerman*, define the Fifth Circuit as especially protective of First Amendment public forum free speech.

Part Two: Questions Addressed by the Court

1. What is the distinction between traffic control and “security” costs?

a. The New Parade Ordinance does not distinguish between traffic control and other police functions or costs.

Section 19-636 (B) of the New Parade Ordinance provides:

Each permit holder is responsible for the costs of:

- (1) providing traffic control devices for the procession route in accordance with section 19-66 of this chapter;
- (2) providing traffic control personnel, whether on duty or on overtime, for the procession route;
- (3) cleaning up the procession route.

Costs will be determined based on the proposed route, time of day, time of year and anticipated number of individuals in procession. For First Amendment events, the City shall absorb the first \$3,000 of the traffic control device and traffic control personnel costs on behalf of the permit holder.

Traffic control personnel shall be in a number sufficient to adequately safeguard the safety of the event participants and the general public, as determined by the chief of police. Traffic control personnel shall be limited to the furthest extent practicable to city uniformed police officers, and may include, with approval of the chief of police, other uniformed, certified peace officers knowledgeable of traffic control laws. Events held within the downtown expressway loop requires [sic] the use of SAPD officers, unless staffing restraints would lead to the denial of the permit, in which case the use of other certified peace officers may be permitted by the chief. (emphasis added)

This provision makes no distinction between “traffic control” functions and “security” or “safeguarding” functions. Indeed, it explicitly requires that “traffic control personnel” be San Antonio police officers or, with the approval of the chief of police, “other certified peace officers,” who are licensed to do public security. And it explicitly requires that the chief of police assign a sufficient number of police officers to “adequately safeguard the safety of the event participants and the general public.” No other provision in the New Parade Ordinance makes a distinction among different kinds of police functions.

b. The Prior Parade Ordinance did not distinguish between traffic control and other police functions or costs.

The Prior Parade Ordinance provided, in Section 19-440 (Duties of Permittee), as follows:

- (b) Prior to the issuance of a parade permit for a parade which is nonpolitical in nature, the applicant shall be required to file with the chief of police a surety bond ... in an amount which will cover the estimated costs of barricading, **policing**, and cleaning-up the parade route. ... The permit holder shall bear all costs relating to traffic control devices and **any on-duty and overtime police required for the event.** (emphasis added)

No other section of the Prior Ordinance refers to police costs of any kind.

c. There is no established practice for the San Antonio Police Department to distinguish between traffic control and other police functions and costs regarding street marches.

Plaintiffs have examined San Antonio Police Department Parade Permit Records for the years 2003-2007, produced by Defendant. Attached hereto is an Affidavit of Gloria Ramírez, who examined the parade permit records. As Ms. Ramírez states, the records contain no indication of any distinction between traffic control costs and security costs. Although both Assistant Chief David Head and Officer Jenkins testified that they intended to implement such a distinction in the future, this testimony is not sufficient to establish its reality. Indeed, the conflicting information given at the hearing and in the records suggests that there is no established practice of separating these costs. Officer Head testified that, of the \$5,277.74 charged for one of the Immigration Marches in 2006, “that had security costs built into it... a large portion of that was security.” (Tr. 86, 3-7) Assistant Chief David Head testified that “in my recollection, the only time that we have addressed the issue of security, as I think we are all talking about it, is with the KKK march that occurred in the early eighties.” (Tr. 119, 6-10).

Because there is no established practice of separating traffic control costs from security costs, there is no reason to conclude that either the New or the Prior Ordinance embodies such a distinction.

2) Assuming that the costs for traffic control could be accurately distinguished from other police costs, would it be constitutionally permissible for a city to charge permit holders the costs for traffic control personnel and devices?

The Fifth Circuit’s decision in *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981), discussed above, directs that the City may charge permit holders for costs associated with traffic control and clean-up only if the imposition of such costs “is necessary.” Surely the Fifth Circuit would not allow the City to impose costs so high that many applicants will not be able to afford to march.

Moreover, under the public forum doctrine discussed above, even under intermediate scrutiny, the City cannot impose traffic control personnel and device costs on parade permit holders. First, it is not clear that cost recoupment is a “time, place, or manner” regulation. The

only possible argument is that making permit-holders bear the costs of traffic control and clean-up will encourage marchers to avoid any interactions with cars and to clean up after themselves, but that is a very tenuous assertion. Second, the need to “narrowly tailor” the restriction would at least require the City to charge only for overtime officers and not for on-duty officers whom the City would have to pay regardless of whether there was a street march. Similarly, the restriction is not “narrowly tailored” if the City requires permit-holders to rent traffic control equipment from the few “certified” companies that charge an unreasonably high price for rentals.

Third, is the City’s need to recoup its costs a credible rationale for the substantial burden on parade permit holders? Are the permit costs a reasonable way to promote the City’s need for more funds? What other activities, lawful or unlawful, are required to pay for police services? San Antonio does not charge criminals or their victims for the costs of police investigation of criminal activity or the arrest of suspects. San Antonio does not require drivers to pay for police traffic control, assistance at the scene of an accident, or preparation of accident reports. Parents are not charged when police help locate and return lost children; landlords do not pay for protection while evicting tenants. Neither the Spurs nor their fans are charged for traffic control personnel on game nights. Pedestrians, whether walking alone or in groups, whether discussing politics or movies, are not charged for police traffic control and protection.

Indeed, under the “municipal cost recovery rule” or the “free public services rule” cities cannot recover the costs of police and fire services against tortfeasors who precipitate the need for such services. As the Ninth Circuit explained in *City of Flagstaff v. Atchison, Topeka & Santa Fe*, 719 F.2d 322 (9th Cir. 1983), “the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service.” *Id.* at 323. *See also Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099 (Ill. Sup. Ct. 2004). Surely the First Amendment cannot permit local governments to recoup police and other costs from people who are lawfully exercising their Constitutional rights when those governments cannot recover their costs from criminal and tortfeasors?

Finally, the fact that police and traffic control costs have been routinely waived and reduced by influential people at every level of City government suggests that the City’s concern for fiscal conservation is less than significant. The City continues to argue that it is free to grant waivers of parade-related costs contained in “other ordinances” both now and in the future. As it is, the

City absorbs hundreds of thousands of dollars in police traffic control costs for Fiesta, Rodeo, Final Four, Spurs, and other events as a gift to large, wealthy organizations. The effort to collect a few thousand dollars from small organizations and low-income individuals is difficult to understand.

Therefore, under *Fernandes v. Limmer*, and the authorities discussed above, the City cannot constitutionally charge parade permit holders for the costs of traffic control personnel and devices, even if those costs could be accurately separated from security costs and assessed in a uniform, non-discretionary fashion.

(3) Is it constitutionally permissible for the City to waive police, barricade and/or clean-up costs for some street marches while imposing them for others?

The City has made several different arguments for why the City may waive the cost of traffic control and clean-up for favored marches and parades is constitutionally permissible. Yet all of them misinterpret fundamental First Amendment law. The streets are a traditional public forum. Picking and choosing who may have free access and who will have to pay is the epitome of unconstitutional behavior in this context.

Justice Scalia, writing for the majority in *Thomas v. Chicago Park District*, 534 U.S. 316 (2002) gave the simple answer to the City’s arguments. “Granting waivers to favored speakers (or, more precisely, denying them to disfavored speakers) would of course be unconstitutional...” 534 U.S. at 325. There is no doubt that content-based access to a traditional public forum is unconstitutional.

Moreover, the permit application records produced by the Defendant reveal a complex system of favoritism that permeates the parade permit process at every level of the City government. With such an established system of constitutional violations, a clear, inclusive, and transparent permitting system is crucial to restoring the integrity of free expression in San Antonio.

4. A Final Question that the Court Did Not Ask: Are Sidewalks “Ample Alternatives for Communication” within the Meaning of First Amendment Law?

In *Knowles v. Waco*, 462 F.3d at 434, the Fifth Circuit explained the meaning of “ample alternative means of communication” by reference to the Supreme Court’s decision in *Members*

of *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984): “While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction of expressive activities may be invalid if the remaining modes of communication are inadequate.”

“Inadequate” means inept or unsuitable. Sidewalk marches are inadequate in several ways: (1) sidewalks are either inaccessible or much more difficult for people in wheelchairs and for people with other physical challenges (Tr. 70-72); (2) sidewalks are unsafe for crowds of people trying to cross intersections or avoid nearby traffic (Tr. 26-28, 38-39, 47-48); (3) sidewalk marches inevitably inconvenience pedestrians and often lead to altercations (Tr. 39-40); (4) in many parts of the City, there are no sidewalks; (5) sidewalk marches do not attract the same level of participation; and (6) sidewalk marches do not have the same communicative significance as street marches.

For all of these reasons, sidewalk marches are not an adequate alternative to street marches.

Part Three

To obtain a preliminary injunction, Plaintiffs must demonstrate (1) substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not granted, (3) that the threatened injury outweighs the threatened harm to the Defendant and (4) that granting the injunction will not disserve the public interest. *Mississippi Power & Light v. United Gas Pipe Line Co.* 760 F.2d 618, 621 (1985). No one factor is necessary or controlling; the Court may consider the particular intensity of specific factors, such as harm to Plaintiffs, even if other factors are not clearly established. *See, e.g. Siff v. State Democratic Executive Committee*, 500 F.2d 1307 (5th Cir. 1974); *Florida Medical Assoc. v. U.S. Dept. of Health, Education and Welfare*, 601 F.2d 199 (5th Cir. 1979). In this case, all four factors weigh in favor of granting of Plaintiff’s Motion for Temporary Restraining Order.

1. Likelihood of success on the merits.

This Post-Hearing Memorandum, together with Plaintiffs’ Memorandum and Supplemental Memorandum in Support of Their Motion for Preliminary Injunction provide extensive legal authority to show that Plaintiffs are likely to succeed on the merits of their challenge to the constitutionality of San Antonio’s New and Prior Parade Ordinances. While discovery will provide much more information with which to evaluate the Parade Ordinances, Plaintiffs

presented testimony at the Hearing to establish the significant impact the Ordinances will have on Plaintiffs' access to the traditional communicative activity of street marches.

2. Likelihood that movant will suffer irreparable injury if the injunction is not granted.

Enforcement and other implementation of the New Parade Ordinance will substantially infringe Plaintiffs' Free Speech and Equal Protection rights and will substantially chill speech throughout San Antonio. These injuries cannot be measured or remedied.

A preliminary injunction may properly be granted where Plaintiffs' injuries cannot be redressed by the application of a judicial remedy after a hearing on the merits. *Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). An injury is irreparable "if it cannot be undone through monetary remedies." *Dillard v. City of Greensboro*, 870 F.Supp. 1031, 1035 (M.D.Ala. 1994) quoting *Cate v. Oldham*, 707 F.2d 1176, 1189 (11th Cir. 1983).

3. The threatened injury outweighs the damage the injunction might cause the opponent.

Granting an injunction in this case will merely require Defendant to continue to follow existing ordinances. Under these circumstances, Plaintiffs risk far greater harm if the injunction is not granted.

4. Injunction will not disserve the public interest.

The public interest here is served by ensuring that the Constitutional rights of residents are respected and protected by Defendant. *State of South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

Accordingly, Plaintiffs respectfully request that the Court enjoin Defendant from enforcing the New Parade Ordinance and from continuing to enforce the Prior Parade Ordinance to require payment of costs for police, traffic control, and clean-up by parade permit holders until such time as the Court may enter final judgment in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on, January 29, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system that will send notification of such filing to Assistant City Attorneys Deborah Klein and Cathy Sheehan, Attorneys for Defendants.

 /s/ Amy Kastely
Amy Kastely